Supreme Court, U.S.
FILED
AUG 19 2003
CLERK

No. 02-1817

IN THE

# Supreme Court of the United States

GARY MAYER,

*Petitioner,*

*v.*

NEXTEL WEST CORPORATION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF IN OPPOSITION

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## CORPORATE DISCLOSURE STATEMENT

Respondent Nextel West Corp. is a wholly-owned, indirect subsidiary of Nextel Communications, Inc. which is publicly traded.

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## SUMMARY OF THE CASE

Petitioner Gary Mayer ("Mayer") commenced this action alleging that Nextel West Corp.'s ("Nextel") decision to terminate his employment was motivated by his age. The district court granted summary judgment for Nextel. The Eight Circuit affirmed "because the evidence does not create a reasonable inference that age was a determinative factor in Mayer's termination."

Mayer makes two arguments in his Petition for Writ of Certiorari. First, he argues that the Eighth Circuit's holding is contrary to this Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000). Second, he argues that the Eighth Circuit's holding is inconsistent with the rulings of other circuit courts. Nextel respectfully submits that the Eighth Circuit's holding is well reasoned, properly applies *Reeves*, and is consistent with the rulings of the other circuit courts referred to by Mayer.

## COUNTER STATEMENT OF THE CASE

Nextel refers the Court to the "Background" section of the Eighth Circuit's opinion for a recitation of the relevant facts. In addition, pursuant to Rule 15 of the Rules of the Supreme Court of the United States, Nextel addresses what it perceives to be five (5) misstatements of fact in the Petition.

First, Mayer claims that he "received good performance reviews." This claim is not supported by the record. The record relied upon by the Eighth Circuit established that, on January 27, 1999, Callahan (Mayer's supervisor) prepared a written performance evaluation for Mayer. This evaluation rated Mayer's performance on a scale of 1-5 ("1" being the

lowest score). Although Callahan gave Mayer an overall rating of "3" (Satisfactory), there were three areas where Callahan rated Mayer "2" (requires improvement). In August of 1999, Callahan prepared a written Mid-Year Evaluation in which he reviewed Mayer's performance. This evaluation included a "Corrective Action Plan," which was required for any employee, such as Mayer, who received a "1" or "2" score on any item or area in his or her most recent performance evaluation. These performance evaluations do not meet Nextel's definition of "good."

Second, Mayer claims that his "supervisor fired him without warning."[1] As the Eighth Circuit noted: "A review of his [Mayer's] performance evaluations, including his 1999 mid-year evaluation and corrective action plan, could be construed as notice that his performance was not exemplary."[2] Moreover, there was evidence that Callahan criticized how Mayer handled two major accounts just prior to his termination. For example, in September 1999, Callahan sent an e-mail to Mayer strongly criticizing his handling of a major account.

Third, Mayer states that his supervisor made a remark about hiring the "right person," which he claims "might be interpreted by a jury as a preference for younger rather than older employees."[3] As the Eighth Circuit noted,

> Mayer's argument distorts the evidence. Callahan wrote the order to hire the "right" people in

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1. Petition at 2.

2. Petition, Appendix A at 13a.

3. Petition at 3.

> Mayer's performance evaluation two years before Nextel terminated Mayer. Callahan never explained to Mayer, and Mayer never asked Callahan, if the order meant Mayer should only hire young people. . . . The "two to six years experience" comment Mayer references is taken from Callahan's deposition, but Mayer's quotation is incomplete. Callahan testified his criteria for the "right" person "would probably be two to six years sales experience, somebody that can manage high activity, that has been in a high activity business, someone that is intelligent, articulate, has sales experience, can overcome objections."[4]

Fourth, Mayer claims, "Respondent changed its story" after it terminated his employment.[5] The record does not support this claim. The record establishes that, on September 30, 1999, Callahan terminated Mayer's employment for poor business judgment, poor product knowledge, and poor management skills. At his deposition, when asked to give specific examples to support the termination, Callahan explained that there were "multiple events that led up to Gary's termination." Callahan then described the specific events to which he was referring.

Fifth, Mayer claims, "all of the reasons assembled by Respondent for Petitioner's termination are contradicted by Respondent's own reviews of Plaintiff's performance."[6]

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4. Petition, Appendix A, at 13a.

5. Petition at 4.

6. Petition at 4.

The record does not support this claim. To the contrary, the record establishes that Mayer did not dispute any of the "multiple events" described by Callahan at his deposition. Moreover, the August 1999 Performance Evaluation and Corrective Action Plan was entirely consistent with, and supported the truthfulness of, Callahan's reasons for terminating Mayer's employment. For example, in these performance reviews:

- Callahan stated that Mayer has made no improvement in the area of listening, referencing the undisputed fact that Mayer missed a customer appreciation day and mis-communicated a promotion – two of the "multiple events" given by Callahan as reasons he terminated Mayer's employment.

- Callahan stated that Mayer needs to continue to work on holding all account executives accountable to their forecast – another of the "multiple events" given by Callahan as reasons he terminated Mayer's employment.

- Callahan stated that Mayer needs "to continue to focus on product knowledge" – another of the "multiple events" given by Callahan as reasons he terminated Mayer's employment.

In summary, the record was replete with undisputed evidence that performance issues were brought to Mayer's attention and he failed to adequately address them. Conspicuously absent from the record is any evidence that the decision to terminate Mayer's employment had anything to do with his age.

## REASONS FOR DENYING THE PETITION

### I. THE EIGHTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISION IN *REEVES*.

A plaintiff's *prima facie* case, "combined with sufficient evidence to find that the employer's asserted justification is false, ***may*** permit the trier of fact to conclude that the employer unlawfully discriminated." (Emphasis added). *Reeves*, 530 U.S. at 148. Use of the word "may" can have only one meaning in this statement.

> The Supreme Court has made clear a "plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false," will not "*always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational fact finder could conclude that the action was discriminatory."[7]

In other words, the ultimate question is still whether the employer intentionally discriminated, and the ultimate burden of proving intentional discrimination remains with the plaintiff. *Reeves*, 530 U.S. at 143; *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). Thus, contrary to Mayer's argument, this Court has clearly stated that a fact issue regarding an employer's asserted justification for its decision does not preclude summary judgment.

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7. Petition, Appendix A, at 9a.

Mayer argues that *Reeves* mandates that a case must go to the jury if there is a fact issue regarding the employer's asserted justification for its decision unless one of two limited exceptions are met: 1) the record conclusively reveals another non-discriminatory reason for the employer's decision; or 2) there is abundant and uncontroverted independent evidence that no discrimination occurred. However, the passage from *Reeves* that Mayer cites to for this proposition does not set forth limited exceptions. It sets forth illustrative examples. Indeed, the pertinent sentence begins with the phrase "[f]or instance." *Reeves*, *supra*, at 148.

Put another way, *Reeves* does not create a bright line rule. It explains that evidence calling into question an employer's justification for a decision should be considered for purposes of determining whether the plaintiff has created a reasonable inference that age was a determinative factor in the adverse employment decision. In fact, the primary reason this Court reversed the Fifth Circuit in *Reeves* was its finding that the Fifth Circuit erred in assuming that a plaintiff must introduce "additional independent evidence of discrimination," above and beyond evidence that the employer's proffered reason was false, in order to withstand a summary judgment motion. *Reeves*, *supra* at 120.

While evidence that an employer's justification is false may, under certain circumstances, be enough to avoid summary judgment, *Reeves* clearly explains that a weak issue of fact regarding an employer's justification for a decision may not be sufficient to avoid summary judgment in the absence of other evidence creating an inference that age was

a determinative factor in the decision. This is precisely what the Eighth Circuit reasoned in this case.

> We do not believe Mayer's pretext evidence is particularly compelling, but do not need to reach directly the issue of whether an issue of material fact exists as to pretext. Suffice it to say, Mayer's evidence does not even remotely resemble the type of evidence the Supreme Court discussed in *Hicks* and *Reeves* when declaring a plaintiff may, in some cases, survive a summary judgment motion by establishing a prima facie case and presenting sufficient evidence of pretext.[8]

Mayer essentially argues, if a plaintiff establishes a *prima facie* case and creates a fact issue with regard to the employer's justification for a decision, the employer is not entitled to summary judgment unless it proves that it did not discriminate through the submission of uncontroverted independent evidence. This argument constitutes a request that this Court lower the evidentiary standard a plaintiff must meet to avoid summary judgment and modify the *McDonnell Douglas* system to shift the burden of production back to defendants if there is a fact issue regarding the employer's proffered explanation for its decision. *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973). There is no basis for Mayer to make such a request which flies in the face of a long line of Supreme Court authority stating that the ultimate burden of proving intentional discrimination remains with the plaintiff. *Reeves*, 530 U.S. at 143; *Hicks*, 509 U.S. at 511.

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8. Petition, Appendix A, at 10a, n.6.

In summary, this Court has clearly stated that a plaintiff may use evidence that an employer's justification for a decision is false to meet his burden of production under *McDonnell Douglas*. However, such evidence, in and of itself, will not always fulfill the plaintiff's burden on summary judgment. Consistent with these mandates, the Eighth Circuit reasoned that Mayer's "weak" evidence of pretext was not sufficient, on its own, to create a reasonable inference that age was a determinative factor in Mayer's termination.

## II. THE EIGHTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE RULING OF ANY OTHER CIRCUIT COURT.

Mayer cites two cases for the proposition that the Fourth and Fifth Circuits differ from the rest of the circuits in their application of *Reeves*: *Blow v. City of San Antonio*, 236 F.3d 293 (5th Cir. 2001); and *Rowe v. Marley Company*, 233 F.3d 825 (4th Cir. 2000). These two cases do not conflict with the Eighth Circuit's decision in this case, and do not set forth the new evidentiary standard Mayer asks this Court to adopt.

In *Blow*, the Fifth Circuit noted that it was presented with "a straight forward application of *Reeves*." *Blow*, *supra*, at 298. Unlike the Eighth Circuit here, the Fifth Circuit in *Blow* determined that the plaintiff had made a strong showing of pretext through evidence of a scheme to actively conceal a promotional opportunity form the Plaintiff and prevent her from having an opportunity to pursue that promotion. *Id.* at 297. The Fifth Circuit held that this evidence, on its own, was sufficient to create a reasonable inference of discrimination in that case. In other words, it applied the same analysis as the Eighth Circuit here. The only difference

is that the Eighth Circuit held: "We do not believe Mayer's pretext evidence is particularly compelling" and thus it is insufficient to create a reasonable inference of discrimination.[9]

In *Rowe*, the Fourth Circuit affirmed summary judgment on behalf of an employer based upon a finding that there was insufficient evidence that the proffered reason from the employer was false. In its opinion, consistent with the Eighth Circuit's application of *Reeves*, the Fourth Circuit stated:

> Put another way, in *Reeves*, the Supreme Court held that when a plaintiff establishes a prima facie employment discrimination case and that his employer's explanation is pretextual, this does not automatically create a jury question, but it *may* do so. Even when a plaintiff demonstrates a prima facie case and pretext, his claim should not be submitted to a jury . . . if "no rational fact finder could conclude that the action was discriminatory."

*Rowe, supra*, at 830. This is the exact determination that the Eighth Circuit made in this case.

In short, there is clearly no conflict between how the Eighth Circuit, Fifth Circuit and Fourth Circuit interpret *Reeves*. The decisions in this case, *Rowe*, and *Blow* only differ because the respective circuits considered different evidentiary records.

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9. Petition, Appendix A, at 10a, n.6.

## CONCLUSION

For the reasons set forth above, Nextel respectfully requests that Mayer's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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